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No. 89-1456

In The

Supreme Court of the United States

October Term, 1990

UNITED STATES OF AMERICA,

Petitioner,

v.

R. ENTERPRISES, INC., AND
MFR COURT STREET BOOKS, INC.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

When a subpoena, seeking records related to activities protected by the First Amendment, is challenged on grounds that compliance will arguably abridge free expression, must a prosecutor show the records will advance a "compelling state interest" and that there is a "substantial" relationship between the records sought and the grand jury investigation?

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STATEMENT OF THE CASE

On August 12, 1988 counsel for the respondents stood in the United States District Court in Alexandria, Virginia and argued in defense of a contempt proceeding that the subpoenas served upon MFR Court Street Books ("MFR"), a small bookstore in Brooklyn, New York, and R. Enterprises, a distributor of adult materials in Manhattan, should have been quashed. (629-649)[1] In detailed affidavits, (45 pages) and in argument, counsel pointed out that the retail bookstore in Brooklyn sold books to local customers and never did any business in Virginia. (494-514) The same was said of R. Enterprises, a distributor of adult material in Manhattan. (333-358; 466-489)

It was urged that documents demanded in the subpoenas were irrelevant to the grand jury's investigation and violated the respondents' rights under the First and Fourth Amendments, as well as Rule 17(c) of the Federal Rules of Criminal Procedure. As a consequence, it was said that the broad subpoenas constituted an abuse of the grand jury process. (349, 494-514) Counsel also argued that if these two small companies had to deliver all their papers to a grand jury in Virginia, it would have a chilling impact on the distribution of books and video-films presumptively protected by the First Amendment. (353, 354)

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[1] Page numbers followed by "a" refer to the Government's petition appendix. Those numbers without letters refer to the joint appendix filed in the United States Court of Appeals for the Fourth Circuit.

In response to these constitutional arguments the prosecutor said, in essence, we don't have to give any reasons why we are subpoenaing all of a company's records down here to Virginia. (649) And, perhaps, at that very moment this case was destined to reach this Court. The district court yielded to the Government's position and found MFR and R. Enterprises in contempt. (702-703) But the Fourth Circuit reversed their judgments of contempt and held that, because the Government had made no showing of how the books and records sought were relevant to the grand jury investigation, the subpoenas should be quashed under Rule 17(c). (8a-10a)

However, the long and tortured prior history of this case is most revealing and tells the Court something of the prosecutor's zeal in this "star-crossed" investigation. Thus, it may be helpful to trace this controversy back to its origin. The case actually began in October of 1986, when the government embarked upon an investigation of shipments into Virginia of video-tapes suspected of being obscene. The campaign was launched under the leadership of Henry Hudson, the former chairman of the Attorney General's Commission on Pornography, better known as the "Meese Commission," and now the United States Attorney for the Eastern District of Virginia.

The First Subpoena Issued to Model Demanded Approximately 2,000 Video-tapes And Over 400,000 Documents.

The prosecutor issued a subpoena to Model Magazine Distributors, Inc. ("Model") a New York corporation, that distributes adult material. (243-244, 21a-23a) The subpoena called for the production of over 2,000 video-tapes and virtually all of its business records – totalling over 400,000 documents! (19, 200, 336) In response to the subpoena Model delivered to the Virginia grand jury all of its papers that were in any way related to Virginia.[2] (15-19) However, it declined to produce the 2,000 video-tapes and the 400,000 documents related to sales in New York and other eastern states. To have complied with these subpoenas would have brought a complete halt to Model's circulation of magazines and video-tapes. (212, 213)

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[2] Model ultimately produced: (1) all of its tax returns for the years 1980 through 1985; (2) all of its records of sales and shipments to firms in Virginia; (3) all records of its shipments to B & D Corporation in Maryland; (4) Model stock certificates and corporate minute books; and, (5) a listing of all its assets; all lease agreements; stock redemption agreements; and records of loans made. It also advised the Government that it had no consulting agreements or expense records covering travel and entertainment in the state of Virginia. (15-19; 118-119; 624-626; 669)

Model Stops Doing Business In Virginia Because Of The Grand Jury Investigation And The Demand For All Its Records.

In October of 1986, because of the prosecutors actions, Model suspended all shipments of video-tapes, paperback books, and magazines into Virginia. (13, 673) Model's distribution of merchandise into Virginia was halted not because it believed the materials were unlawful, but simply to avoid the legal expense of a continuing investigation. (13, 673)

Model moved to quash the subpoena, setting forth in elaborate detail why, under this Court's decisions, the subpoena was overbroad. The motion was denied, Model was held in contempt, and an appeal was taken to the Fourth Circuit. (243) On September 24, 1987, the Fourth Circuit reversed the judgments of contempt because the subpoenas were impermissibly vague and overbroad. (241-257; 19a-56a) *In re Grand Jury Duces Tecum (Model I)*, 829 F.2d 1291 (4th Cir. 1987) On November 6, 1987, the Government filed a petition for rehearing together with a suggestion for rehearing *in banc*. That application was denied on April 19, 1988.[3] (19a-56a; 16a-18a). No further review of the Fourth Circuit's decision in *Model I* was sought.

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[3] In denying the Government's petition for rehearing, the court confined its "holding" to the impermissible vagueness and overbreadth of the "lascivious, lustful, and lewd" terminology in the subpoena, but the court did not withdraw its earlier panel opinion. 844 F.2d at 203. The Fourth Circuit did not reach the question of the relevancy of business records in this earlier case.

The Prosecutor Demands Virtually All Of The Records Of A Retail Bookstore In Brooklyn And A Distributor Of Adult Materials In Manhattan.

Despite Model's stopping all shipments into Virginia the prosecutor, on April 26, 1988, struck again with a new barrage of subpoenas, directed not only to Model, but also to MFR and R. Enterprises. MFR is a small retail bookstore located in Brooklyn, New York. (506) It is a New York corporation and occupies a store that is approximately 15 feet wide and 45 feet deep. (512) It sells paperback books, magazines and video tapes to adults in downtown Brooklyn. It has never engaged in any interstate business in Virginia or for that matter any other state. (62, 341-342, 495, 496, 512)

R. Enterprises is a New York corporation that distributes adult material. (342) It commenced doing business under the trade name of "Coast-To-Coast Video" in May of 1985. (471, 508, 518, 519) R. Enterprises and MFR are both owned by Martin Rothstein. (122, 472) However, neither company has ever shipped any merchandise into the State of Virginia. MFR Books, R. Enterprises and Model are separate and distinct corporations and file separate corporate tax returns. (620, 637, 638) The Government has never produced any evidence from any source – confidential informants or otherwise – that R. Enterprises, Inc., or MFR ever engaged in any business in Virginia. (620, 637-638)

The subpoenas served upon MFR and R. Enterprises required the production of virtually all of their business records before a Federal grand jury in Virginia. (70a-74a;

79a-82a) The prosecutor demanded for a four year period: *all* their canceled checks; bank statements; and check books; *all* records of loans and mortgages received and given by the corporation; and *all* financial statements. (359-361, 515-517)

Also demanded were *all* of the respondents' corporate contracts and lease agreements; *all* records relative to the acquisition or sale of real-or-leasehold property, including purchase contracts, settlement sheets, contracts of sale, deeds, mortgages, deeds of trust and correspondence, memoranda, notes or meetings, and/or telephone calls relating to or connected in any way with the acquisition or sale of property. (360, 361, 516, 517)

The United States Attorney also insisted upon delivery to the grand jury of all records of purchases of inventory and goods held for resale, including, but not limited to, invoices from vendors, records of receipts and records of material returned to the supplier; *all* records relating to travel and entertainment expenses paid by or incurred on behalf of the corporations; and finally all records of investments made by or on behalf of the corporations. (360, 361; 516-517)

The respondents were forced to file a second set of motions to quash on the grounds that there was no showing of how these records were *relevant* to the grand jury's ostensible investigation of the sale of obscene materials in Virginia. These applications were supported by verified facts indicating that the records requested could not possibly be related to a grand jury's inquiry in Virginia. The affidavits spelled out that R. Enterprises had never:

> " . . . sold to anyone in the state of Virginia; they had never shipped, transported or sent by carrier into the state of Virginia any merchandise of any kind. Furthermore, it has never purchased any materials from Virginia. And finally R. Enterprises has no customers of any kind in the State of Virginia." (194-224, 342)

An Affidavit filed on behalf of MFR stated essentially the same thing. (494-514) Both MFR and R. Enterprises declared that the delivery of all their records to a grand jury in Virginia would constitute an abuse of the grand jury process and would be unconstitutional.[4] (349, 494-514) MFR and R. Enterprises also averred that to produce all their records would impose a prior restraint on materials "presumptively protected" by the First Amendment. (352-358) It was stated in the affidavits that the business records were inextricably intertwined with the materials sold and further once their customers learned that they were the subject of a grand jury investigation in Virginia, they would no longer continue to do business with them. (352)

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[4] The Government's brief tries to make it sound as though R. Enterprises and MFR assertions of lack of connection to Virginia are conclusory and therefore the prosecutor was not obliged to accept the statement. (Gov. Brf. pp. 30, 31) However, it should be plain that MFR's intrastate activities and R. Enterprises lack of connection to Virginia are supported by *facts* contained in sworn affidavits. (A 62-63, 342-343, 494-497, 506-510, 620, 637-639) We don't know how it can be said that a company does not do business in another state except by saying it in the most direct way. However, in sharp contrast to the affidavits provided by respondents, the Government never contested these facts and the Fourth Circuit, in its opinion, pointed out that the prosecutor never even *"alleged"* that the respondents did business in Virginia. (620, 637-38, 8a)

Q: "What would you expect to find in MFR's business records?"
A: "I'm not sure your honor. I don't know."

At one point in the proceedings Judge Ellis asked of the prosecutor, "What would you expect to find in MFR's business records?" And the prosecutor understandably answered: "I'm not sure your honor. I don't know." (645) The prosecutor took the position the Government did not have to demonstrate any relevancy.[5] (85, 408, 472-474, 523, 649) The motions to quash were denied and on August 12, 1988, MFR and R. Enterprises were held in contempt. (702, 703)

Once again respondents were compelled to seek relief in the Fourth Circuit, and on August 31, 1989, that court vacated the contempt convictions for MFR and R. Enterprises. (1a-15a) It reversed the contempt judgment against Model for the 193 video-tapes on the grounds that the prosecutor made an insufficient showing of how it

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[5] The Government claims that Mr. Rothstein admitted to an FBI agent that "R. Enterprises, MFR books, and Model were all the same thing." (Gov. Brf. at 3) However, the prosecutor has omitted a crucial portion of the quotation of the FBI agent making it sound as if Mr. Rothstein said that all three companies were engaged in the same business. When Martin Rothstein was served with the three subpoenas for Model, R. Enterprises and MFR, the FBI agent alleges that Mr. Rothstein accepted service with the statement: "It's all the same thing, I am the president of all three." (401) He never said that all the three companies are one and the same. While Mr. Rothstein owned all three corporations, it is clear that these were three separate corporations engaged in completely different business activities. (506-510, 637-638)

was believed that the videotapes were obscene. However, it upheld that subpoena requiring Model to produce certain of its business records before the grand jury.

The Fourth Circuit Decision

When the Fourth Circuit undertook consideration of the MFR and R. Enterprises subpoenas, it was, of course, the *second* time the case was before it. The first time the court was forced to quash a subpoena that demanded close to 2,000 video-tapes. On this second occasion the court was confronted with the same prosecutor seeking virtually all the records of a small retail bookstore in Brooklyn and a distributor of adult material in Manhattan. The court stressed, "Our only concern with respect to the business records requested from Model, R. Enterprises and MFR is the relevancy of those documents to the grand jury's investigation." (7a) The court went on to point out that the prosecutor never made any allegation or produced any proof that the books and records sought were in any way relevant to the grand jury investigation in Virginia.

The court then concluded that in the absence of any showing "linking MFR or R. Enterprises with the Eastern District of Virginia" the motion to quash would have to be granted.[6] The court emphasized that to permit this

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[6] The Fourth Circuit went on to emphasize: "The Government does not allege, and the record contains absolutely no evidence indicating, that either MFR or R. Enterprises has ever

(Continued on following page)

expansive official action to go unabated would allow a "fishing expedition" into the affairs of New York firms in hope that something would turn up. The court went on to hold that "any documents subpoenaed under Rule 17 (c) must be admissible as evidence at trial." (10a) The court indicated that the materials sought would "most likely" be inadmissible at any trial that might occur. (10a)

The Government has mischaracterized the decision below as requiring the Government to make a "threshold showing" of relevance (Gov't. Br. at 23). This language does not appear anywhere in the holding of the Fourth Circuit. The court was careful to point out that the obligation of the Government to demonstrate relevance only becomes operative *after* the recipient of the subpoena shows that the records sought are not relevant to the grand jury's investigation.

(Continued from previous page)

shipped materials into, or otherwise conducted business, in the Eastern District of Virginia. The district court found that the business records of these two companies were relevant to the investigation of Model because MFR, R. Enterprises and Model are all owned by the same individual, Martin Rothstein. The lower court apparently believed that Rothstein's ownership of three companies, in connection with the evidence demonstrating that Model shipped allegedly pornographic material into the Eastern District of Virginia, gives rise to an inference that MFR and R. Enterprises also transacted business in that location. In the absence of any evidence linking MFR and R. Enterprises with the Eastern District of Virginia, however, such an inference is arbitrary at best." (8a, 9a)

SUMMARY OF ARGUMENT

When New York distributors of materials protected by the First Amendment challenged subpoenas demanding all their records before a grand jury in Virginia, must the prosecutor make *some* showing of how those records are relevant to the grand jury investigation? That is truly the issue that brings us to this Court and it calls radically into question our deepest assumptions concerning the protections of the First Amendment and a citizen's right to privacy under the Fourth Amendment. The prosecutor, in the courts below, has steadfastly maintained that he is not obliged to make *any* showing of relevance. His stance constitutes a radical departure from well-established methods of investigating materials guarded by both the First and the Fourth Amendments. He is simply wrong. And here, briefly are the reasons why.

It is well-established that the Government is not free to adopt whatever procedures it pleases in investigating obscenity without regard to the possible consequences for constitutionally protected speech. And that is because free expression is "vulnerable to gravely damaging yet barely visible encroachments."[7] Here, the Government's investigation centered on the shipment into Virginia of video-tapes that are presumptively protected by the First Amendment. This Court has repeatedly recognized that investigative techniques that are suitable in routine criminal cases may be unacceptable when applied to an official inquiry concerning books and films. As a consequence, the Court has refused to allow prosecutors the freedom of investigation normally applied to drugs or other forms of "contraband" because of the consequences such action may have on the exercise of free speech.

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[7] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

Thus, when a retail bookstore in Brooklyn and R. Enterprises in Manhattan, objected to the subpoenas demanding all their records before a grand jury in Virginia, the special rules pertaining to First Amendment cases were fully applicable. And one of those special rules requires that the prosecutor show that there is a "compelling state need" for the books and records sought and that they are "substantially" related to the grand jury's investigation. To invoke this rule, that has such strong roots in our constitutional tradition, MFR and R. Enterprises only had to present a prima facie showing of arguable First Amendment infringement. And that they did.

The Government says that the protections of the First Amendment do not apply to routine corporate records. But once again, they are wrong. It does. Business records enjoy the comprehensive protections provided by the First and Fourth Amendments and those safeguards cannot be avoided by the simple expedient of a subpoena. A grand jury subpoena for all of a company's records carries an obvious threat of prosecution that is just as chilling to a distributor of adult material as the subpoenaing of the videotapes.

That is because the real source of the chill is the *threat* of imminent prosecution, and that fear exists whether the demand is for a single copy of a film or the demand for *all* of a company's list of customers and suppliers. Both can have an equally chilling effect upon the exercise of First Amendment rights. Once suppliers know that a customer is under criminal investigation, they will understandably be reluctant to ship merchandise, recognizing that they may be exposing themselves to a far-off criminal investigation. That is why the law requires a showing of a "compelling interest" and a "substantial" connection to the investigation. In virtually every reported case, we have reviewed, the government has

been able to meet that test and the grand jury investigations have gone forward.

No one is urging that MFR or R. Enterprises' corporate records are immune from a grand jury subpoena. But, before they can be subjected to such broad and expansive demands that will chill the exercise of free expression, there must be a "substantial" showing of how it is their records are relevant to a grand jury investigation in the state of Virginia. Such a requirement does not impose an unbearable burden upon a prosecutor but at the same time it affords dealers in videotapes the reasonable protections provided by the First Amendment. But to suggest that they need make *no showing at all* is an idea that we hope this Court could never support.

And finally, even if this case were not governed by First Amendment principles, the subpoenas were properly quashed on Fourth Amendment grounds and under the authority of Rule 17(c). Under both the Fourth Amendment and Rule 17(c), when a person challenges a subpoena on relevancy grounds, a prosecutor is required to furnish some indication how it is the records are relevant. There must be some mechanism by which these two competing interests – the people's right of privacy and the Government's right to investigate suspected crimes can be balanced. Although it is assumed that the powers of the prosecutor, exercised through the grand jury, will result in earnest inquires, experience has taught us that they can become abusive and overzealous.

Today, in this Court, the Solicitor General acknowledges that the powers of a grand jury are not unlimited. And they are also willing to agree that once a person challenges a grand jury subpoena claiming that the records sought have "no conceivable relevance" to the grand jury's investigation, the prosecution is obliged to make some showing of

relevance. But such an unrealistic standard would, for all practical purposes, eliminate completely the relevance requirement established by earlier decisions of this Court and is constitutionally unacceptable.

A person objecting to a subpoena on Fourth Amendment grounds should only have to make a "reasonable" showing of a lack of relevance. Once that threshold showing is made, then, and only then, must the Government come forward with some assurance that the evidence they seek is relevant to the inquiry – which is precisely what the Fourth Circuit held. And, of course, the showing of relevancy may be "minimal" and, where necessary, it may be furnished to the court *in camera*. But, such "minimal" assurances are indispensable, if the people are to be afforded the protections contemplated by the Fourth Amendment and by Rule 17(c). This practical rule has been applied by other circuit courts that have addressed this specific issue.

To allow a prosecutor unlimited authority on issuing subpoenas for any and all records that suit his fancy would be an open invitation to a serious abuse of that power. And, it bears repeating that prosecutors will not be prejudiced by these requirements because in virtually every case cited both by the Government and the respondents, prosecutors have been able to satisfy district judges why and how the evidence sought was relevant to the grand jury investigations. Through the prudent use of subpoenas or the judicious employment of search warrants, people accused of violating the federal and state obscenity laws have been regularly brought to justice. By following these procedures, the public's right to read and see what they please has been protected and at the same time, the Government's ability to prosecute crime has not been unduly impaired. In few words that is what is at issue in this case and why the judgment of the Fourth Circuit should in all respects be affirmed.

ARGUMENT

I

WHEN A SUBPOENA, SEEKING RECORDS RELATED TO ACTIVITIES PROTECTED BY THE FIRST AMENDMENT, IS CHALLENGED ON GROUNDS THAT THE DOCUMENTS SOUGHT ARE NOT RELATED TO THE GRAND JURY INVESTIGATION, THE GOVERNMENT MUST MAKE A SUBSTANTIAL SHOWING THAT THE RECORDS ARE RELEVANT.

It is well-established that a state "is not free to adopt whatever procedures it pleases [in investigating obscenity] without regard to the possible consequences for constitutionally protected speech," because free expression is "vulnerable to gravely damaging yet barely visible encroachments." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963). Certainly this time-honored principle needs no scholarly vindication. For in an unbroken series of cases extending over a long stretch of this Court's history, it has been held postulate that freedom of expression enjoys a very special place in our hierarchy of constitutional values.[8] Investigative techniques that impinge on the First Amendment rights of distributors of books and films have been consistently condemned by the Court.

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[8] *New York v. P.J. Video*, 475 U.S. 868 (1986); *Walter v. United States*, 447 U.S. 649 (1980); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Heller v. New York*, 413 U.S. 483 (1973); *Roaden v. Kentucky*, 413 U.S. 496 (1973); *Lee Art Theater, Inc. v. Virginia*, 392 U.S. 636 (1968); *Freedman v. Maryland*, 380 U.S. 51 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

Under the First Amendment, the Government can not investigate obscenity charges in a manner that will impermissibly chill the exercise of free speech rights, even if the same investigative strategies would be acceptable in other routine criminal cases. *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 66. In fact, this Court has repeatedly recognized that investigative methods that are suitable in most criminal cases may impermissibly chill First Amendment rights when applied to the cases involving books and films. *See Marcus v. Search Warrant*, 367 U.S. 717, at 730-31; *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205; *New York v. P.J. Video, Inc.*, 475 U.S. 868.

The potential for curtailing the distribution of books and films that results from seizures is equally applicable to a prosecutor's attempt to subpoena records that are inextricably related to the distribution of materials protected by the First Amendment. As the Fourth Circuit said so well in this very case: "The chilling effect of such sweeping and indiscriminate uses of the subpoena power is anything but fanciful; it is altogether real."[9] (12a) The same principle applies whether the actual films are subpoenaed or the business records essential to the distribution of those films are demanded.

It is equally well-settled that the "exercise of the power of compulsory process [must] be carefully circumscribed when the investigative process tends to impinge

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[9] We realize the court used the quoted language when discussing the Government's demand for Model's 193 videotapes. But as we shall point out later the spirit of these words apply equally to the subpoenaing of all of a company's books and records.

upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas. . . . " *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). And where a subpoena impinges upon First Amendment rights, the Government must show a "substantial relation" between the information sought and the subject of a "compelling state interest." *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963) *See also N.A.A.C.P. v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163 (1958); *N.A.A.C.P. v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963). This Court has also stressed, Fourth Amendment standards of reasonableness and specificity must "be applied with scrupulous exactitude" when a person's rights under the First Amendment are at issue. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978)

The "Compelling Interest" Test

In 1972 this Court recognized the "compelling interest test" when considering challenges made to grand jury subpoenas that were claimed to intrude upon a reporter's privilege. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Court found that in each case under consideration, the test of "a substantial relation between the information sought and a subject of overriding and compelling state interest" had been satisfied. 408 U.S. at 700, 701. The Court sustained the grand jury subpoenas because the Government established that the information sought

related "directly" to the criminal conduct being investigated. 408 U.S. at 701, 708.[10]

Circuit courts have faithfully followed the rule discussed in *Branzburg*[11]. When grand jury investigations conflict with the exercise of First Amendment rights, the Government has the burden of establishing that ". . . . its interests are legitimate and compelling and the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests."

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[10] The Court did point out in *Branzburg*: "If the test is that the Government 'convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest' [citing *Gibson* and other authorities]" to justify even an indirect burden on First Amendment rights – it was quite apparent the Government had met that burden. 408 U.S. at 700. Certainly nothing was said in *Branzburg* that indicates this Court is ready to withdraw from the rule celebrated in the impressive line of First Amendment cases housed in footnote 18 of *Branzburg*.

[11] *In re Faltico*, 561 F.2d 109 (8th Cir. 1977) the Eighth Circuit was confronted with a subpoena that commanded the production of the records relating to the membership of a trade association. The association complained that this demand violated their rights under the First Amendment. The court, applying the "compelling interest," test found that the Government sustained its burden and showed a direct relationship between the information sought and the subject of the investigation. 561 F.2d at 111

And in *SEC v. McGoff*, 647 F.2d 185 (D.C. Cir. 1981) the Securities and Exchange Commission was investigating McGoff and two of his publishing corporations. The SEC issued subpoenas for his two corporations as part of an anti-fraud investigation. The District of Columbia Court of Appeals satisfied itself that the Government had shown a "*substantial* relation between the information sought and an important Government interest." 647 F.2d at 192 (emphasis supplied.)

Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972). In addition the prosecution is obliged to show that " . . . there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation." *Id.* This test leaves substantial discretion with district court judges to strike a balance between the competing interests of the First Amendment and the Government's right to investigate potential crimes. It brings to bear on the controversy a disinterested adjudication made without fear or favor. And in that way the public's and the prosecution's rights are adequately protected. As Judge Wilkinson, of the Fourth Circuit, said in an earlier part of this case:

> "If the grand jury is conducting a good faith investigation into possible criminal activity, the second element of the test allows it to subpoena films that are *substantially* related to the investigation. . . . . To subpoena such films, the grand jury must show a *strong possibility* that the requested films will expose criminal activity." 829 F.2d at 1305; (Emphasis supplied)

The reason for the well-conceived rule is manifest. The threat of invoking legal sanctions, implicit in a grand jury investigation, is all the more reason why the broad "all record" subpoenas in this case must be quashed. A grand jury's power of investigation does not carry with it the wholesale authority to issue these broad and sweeping subpoenas. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 558 (1963). When such wide ranging investigations are launched into the realm of free expression, we have much to fear. Any assumption that the possible failure of the grand jury investigation will amply vindicate the free circulation of adult materials is unfounded. For we know from experience that "the threat of sanctions may deter. . . . almost

as potently as the actual application of sanctions.. . . . " *NAACP v. Button*, 371 U.S. 415 at 433. Those who distribute adult materials are discouraged from doing so by the threat of such an all-encompassing and unauthorized taking of their business records and customer lists.

The Fourth Circuit's recognition that the exercise of First Amendment rights can be restrained by the indiscriminate enforcement of such grand jury subpoenas is in keeping with the spirit of this Court's decisions. For instance, this Court has recently held that the power of a grand jury can not override all constitutional protections. *Butterworth v. Smith*, 110 S.Ct. 1376, 1380 (1990) Where there is a risk that the powers of a grand jury will impinge on the exercise of First Amendment rights – even if it is oblique – there must, of constitutional necessity, be a balancing of the individual's rights against those of the prosecution. 110 S.Ct. at 1380 citing *Branzburg v. Hayes*, 408 at 690-691. In this regard, Governmental threats to prosecute the distribution of adult material, even when the threat is implicit, can act as an invalid prior restraint on the distribution of protected material. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).[12]

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[12] *Bantam Books* is a decision that examines more carefully than any other the Court's concern for the chill promoted by veiled threats of prosecution. There this Court invalidated a state commissioner's action that warned bookstores of the possibility of prosecution for the continued distribution of books found objectionable by the commission. The Court found that a request from the state commission for "voluntary" limitation of distribution of explicit material would convince most distributors to comply, as "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." 372 U.S. at 68. It bears repeating that Model has stopped doing all business in Virginia without there ever being any adjudication that any of their videotapes are obscene.

The Government has assembled a large collection of cases dealing with ordinary or routine grand jury investigations. However, they contribute very little to the resolution of the issues presented by this case. None of these authorities deal with the grand jury's power to investigate literature and films that are presumptively protected by the First Amendment.[13] This Court has repeatedly instructed prosecutors that investigations involving free expression implicate principles unique to the First Amendment.

The Government makes much of a number of cases where this Court held the First Amendment did not shield newspapers and bookstores from searches and grand jury investigations. And that is certainly so. But in the relevant cases the Court found that the Government had *sustained its burden* either to obtain a search warrant or to compel production of the records sought.[14] But in

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[13] *United States v. Calandra*, 414 U.S. 338 (1974) (the Fourth Amendment Exclusionary Rule inapplicable to grand jury proceedings); *Costello v. United States*, 350 U.S. 359 (1956) (hearsay admissible in grand jury proceedings); *United States v. Washington*, 431 U.S. 181 (1977) (*Miranda* warnings not required before a grand jury); *United States v. Dionisio*, 410 U.S. 1 (1973) (requiring grand jury witness to produce voice exemplars did not violate his fourth or Fifth Amendment rights).

[14] For instance, in *Branzburg* this Court held the First Amendment does not protect a reporter from having to answer a grand jury's questions concerning an on-going criminal investigation. But as pointed out earlier, there the Court found that the prosecution had fulfilled its burden of showing the need for the information sought. *See also New York v. P. J. Video, Inc.*, 475 U.S. 868 (1986) (no special exemption for a video store

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this case the prosecutor persists in saying he does not have to offer *any* reason why a bookstore in Brooklyn and a distributor in Manhattan should be forced to produce all its records before a grand jury in Virginia. That is quite different from the cases cited by the Government where sufficient showings were made in one form or another. The other cases really have no bearing on the issues presented here.[15] MFR and R. Enterprises make no claim that they are exempt from prosecution under the Federal Obscenity Law. It is the manner in which that investigation is being conducted that brings their grievance to this court.

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from the probable cause standard for a search warrant, but probable cause established); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (newspaper is not immune from search warrants *if probable cause is established*. However the Court suggested in *Zurcher* that an investigatory subpoena would be justified if the Government can demonstrate the material demanded is "sufficiently relevant" and satisfies the [warrant] probable cause requirement" 436 U.S. at 567); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (no special exemption for newspaper publisher from subpoena issued by the Secretary of Labor, but sufficient grounds to compel production of documents established). Gov't Brf. at 29.

[15] *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969) and *Associated Press v. United States*, 326 U.S. 1 (1945) (no special exemption for the press from anti-trust laws); *Associated Press v. N.L.R.B.*, 301 U.S. 103 (1937) (no special exemption for press from labor laws); *Herbert v. Lando*, 441 U.S. 153 (1979) (no special exemption for the media from the general rules of pretrial discovery).

First Amendment Principles Apply To Corporate Records

Next, the Government argues, "The First Amendment does not ordinarily protect routine corporate business records." (Gov. brf. at 28) But, again, they are wrong. In support of this proposition they cite a case involving fraudulent commercial practices and a group of cases involving the enforcement of narrowly drawn IRS summonses for church records in cases testing a church's exempt status.[16] In some of those cases the court did recognize the "freedom of association" and the "freedom of religion" interests. But each of those cases are easily distinguishable from ours because they involved investigations of an organization's tax liability or fraudulent commercial practices – and in the one instance the use of drugs.[17]

As it happened, the organizations involved in those cases claimed that their activities came within reach of the freedom of religion clause or the free association provision. But the investigation never focused on their

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[16] *In re A Witness Before The Special October, 1981 Grand Jury (Manner)*, 722 F.2d 349 (7th Cir. 1983); *United States v. Coates*, 692 F.2d 629 (9th Cir. 1982); *United States v. Grayson County State Bank*, 656 F.2d 1070 (5th Cir. 1981); *cert. denied*, 455 U.S. 920 (1982); *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979).

[17] In *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. , 110 S. Ct. 1595 (1990) the Court found that the exercise of religion clause of the First Amendment did not excuse the religious practice of using hallucinogenic drugs (Peyote) and justified the denial of unemployment benefits.

religious practices.[18] In our case the investigation *is* of the video-films themselves. Such an investigation brings into play much more directly the free speech clause of the First Amendment.

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[18] For instance, in *United States v. Grayson County State Bank*, 656 F.2d 1070 (5th Cir. 1981) the court noted that the IRS summons was limited to specified types of documents. In addition the court stressed that the church failed to present any evidence that enforcement of the summons would restrict the religious activities of its members. 656 F.2d at 1074.

In *United States v. Holmes*, 614 F.2d 985, 989 (5th Cir. 1980), the Fifth Circuit found that the *Powell* test had to be applied more stringently in the case of a church asserting the First Amendment claims. *Holmes* held that the Government had to show a "necessity" for the records rather than mere "relevance" in the case of a summons directed to a church.

In re A Witness Before The Special October, 1981 Grand Jury (Manner), 722 F.2d 349 (7th Cir. 1983) involved the investigation of fraudulent sales of Laetrile. The Metabolic Research Foundation, and its president, Harry Manner, were subpoenaed to produce certain records before a grand jury. Based upon elaborate affidavits submitted by the Government, the circuit court found there was, in fact, a commercial scheme that persons being treated were "customers" not members of the Foundation and, thus, compliance with the subpoena was required. 722 F.2d at 353.

In *United States v. Freedom Church*, 613 F.2d 316 (1st Cir. 1979) the court found that the church failed to make any showing of actual or potential prejudice to their rights of associational freedoms. 613 F.2d at 320. And in *Dole v. Milonas*, 889 F.2d 885, 891 (9th Cir. 1989) the court concluded that the appellant made no showing that political or union advocacy or any other First Amendment interest is implicated here or that the Secretary seeks to put the information to any such use. 889 F.2d at 891.

And even in these "tax exempt" cases, the courts were sensitive to the asserted First Amendment claims. For instance, most of the courts applied the standards set by this court in *United States v. Powell*, 379 U.S. 48, (1964)[19] and found that Government had satisfied those prerequisites before compelling compliance with the IRS summonses. In each of those cases the Government established the *necessity* for the records! Consequently these cases do not bear any resemblance to ours.

Courts confronting this specific issue involving the taking of a company's books and records, along with magazines suspected of being obscene, have regularly applied First Amendment principles to corporate records. For instance in *G.I. Distributors, Inc. v. Murphy*, 336 F. Supp. 1036 (S.D.N.Y. 1972) and *Star Distributors, Ltd. v. Hogan*, 337 F. Supp. 1362 (S.D.N.Y. 1972), the late Judge Edward Weinfeld, one of the finest Federal District Court Judges in the county,[20] concluded that the taking of the corporate records of magazine distributors with a search warrant constituted an impermissible prior restraint. Business records that are intertwined with First Amendment materials are just as much protected as the books and video tapes themselves by the First Amendment.[21] It

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[19] We discuss in detail the standards set by this Court in *Powell* under Point II of this brief.

[20] *In Memoriam*, 693 F. Supp. at LXXXIX (S.D.N.Y. 1988)

[21] *See also Cinema Classics Ltd. v. Busch*, 339 F. Supp. 43, 48 (C. D. Ca. three judge court, Aff'd 409 U.S. 807 (1972) (seizure of still photos and business records – photos and business records ordered returned by three-judge court. Ely, Circuit Judge, and Curtis and Hill, District Judges). And in an another context, the Tenth Circuit held in *In re Grand Jury Subpoena to*

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would be a serious insult to the scholarship of this Court to suggest that all the carefully constructed procedures governing the investigation of magazines and films somehow don't apply when dealing with corporate records essential for the distribution of the films. That makes no sense at all.

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First Nat'l Bank, Englewood Colo., 701 F. 2d 115 (10th Cir. 1983) that grand jury subpoena requiring the production of an anti-tax organization's records would impermissibly chill the right of free association guaranteed under the First Amendment. In addition, First Amendment rights may be implicated by the use of a summons to obtain records of a third party in a criminal investigation. *United States v. Miller*, 425 U.S. 435, 444 N. 6 (1976)

The Second Circuit reversed on other grounds *G.I. Distributors v. Murphy*, 469 F.2d 752 (2d Cir. 1972). But by then, the books and records seized from GI Distributors had been returned by the New York County district attorney's office under Judge Weinfeld's original order and thus were no longer at issue. Nevertheless this Court granted G.I.'s petition for certiorari and vacated the Second Circuit's ruling and remanded the case. *G.I. Distributors, Inc. v. Murphy*, 413 U.S. 913, 93 S.Ct. 3056 (1973). On remand the Second Circuit adhered to its earlier decision. *G.I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (2d Cir. 1973) cert. denied 416 U.S. 939, 94 S. Ct. 1941. However, in the meantime a state court judge suppressed the magazines unlawfully seized from GI Distributors. *People v. Alvin Druss, Irving Herman and GI Distributors, Inc.* Indictment No. 492/72, Birns J., New York County, May 4, 1973.

The Subpoenas Will "Chill" Free Expression

The basic intuition underlying all of these cases is that prosecutors cannot circumvent the comprehensive protections provided by the First and Fourth Amendments by the simple expedient of a subpoena. A grand jury subpoena for all of a company's records carries an obvious threat of prosecution that simply can not go unnoticed by a distributor of sexually explicit material. For as Judge Wilkinson pointed out so incisively in the Fourth Circuit's earlier opinion:

> Faced with sufficiently broad subpoenas and sufficiently serious threats of indictment, not only distributors – but the general community of artists, sculptors, painters and photographers may be reluctant to render erotic or sensual depictions of any sort, including those that would not be found obscene. (48a)

The source of the chill in every case is the threat of prosecution, not the delivery of one copy of a film or magazine. The demand for *all* of a company's list of customers and suppliers can have just as chilling an effect upon the exercise of first amendment rights as the subpoenaing of a single copy of a book or film. Once suppliers know that a customer is under criminal investigation, they will understandably be reluctant to ship merchandise recognizing that they may be exposing themselves to a far-off criminal investigation. That is why, at the very least, before that kind of devastating chill is generated a court should be satisfied that the documents sought are substantially related to the grand jury investigation. A prosecutor simply cannot, through the promiscuous use of a subpoena,, impose a prior

restraint on the respondents' ability to distribute constitutionally protected material without making such a substantial showing.

After all, it is well settled that the form of prior restraint is of no consequence. It is the effect that counts. In determining whether or not Governmental action constitutes an unlawful prior restraint, it is the substance that must be considered, not the form. *Near v. Minnesota*, 283 U.S. 697, 708 (1931); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552-554 (1975).

No one would doubt that if a prosecutor subpoenaed all the *New York Times'* books and records it would have a chilling effect upon the distribution of that newspaper. A prosecutor would have to establish that there was a compelling Government interest requiring the production of those records, and that the records were substantially related to the subject of the investigation. MFR and R. Enterprises are entitled to the same protection afforded the *New York Times* because the security of the First Amendment cannot be made to depend upon the attractiveness of the publication.

In this case MFR and R. Enterprises certainly made out a *prima facie* case of the chilling effect compliance with the subpoenas would produce. *See In re Grand Jury Subpoena to First Nat'l Bank, Englewood Colo.*, 701 F. 2d 115, 118 (10th Cir. 1983). Respondents were only obliged to establish a "*prima facie* showing of arguable First Amendment infringement" in order to trigger the "substantial" relationship test between the information sought and the compelling state interest of the grand jury's investigation.

First National Bank of Tulsa v. U.S. Depart. of Justice, 865 F. 2d 217, 219, 221 (10th Cir. 1989); *see also United States v. Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980).

This awful chill that inevitably flows in the wake of errant grand jury investigations, is confirmed in this very case by the realization that Model stopped doing all business in Virginia in 1986, when it learned it was the subject of a grand jury investigation. (673) What could be better proof of the "chilling" effect of a grand jury's powers gone awry? To allow prosecutors to subpoena the records of a distributor of films and books without any showing of relevance, would carry implications and give directions far beyond the facts of this case. One can almost hear the shouts of prosecutors throughout the country, that we don't have to ever show relevance when we want records produced before a grand jury – no matter how broad our demands. For we are the sole judges of relevance and the recipient of a subpoena has no grounds for challenging our judgment. The consequences of such a rule are terrifying.

There is one very frightening case recently reported that, perhaps more anything we say exemplifies our deep concerns over prosecutorial overreaching in the area of First Amendment freedoms. On July 23rd of this year a Federal District Judge in Washington D.C. was forced to enjoin prosecutors from harassing a distributor of magazines and video-tapes. In that case the prosecutors issued 118 subpoenas characterized by a Federal Judge as "harrassment." *PHE, Inc. v. U.S. Department of Justice*, F.Supp. , 1990 WL 1069992 (D.D.C. 1990). What better evidence is there, than that presented in this actual case

decided several months ago, where a federal prosecutor's power of subpoena has been grossly abused.[22]

The "Compelling Interest Test" Will Not Delay Grand Jury Investigations

The Government also brandishes at the Court the specter of endless mini-trials in which important grand jury investigation will be delayed interminably, if the rules of this Court governing First Amendment cases are enforced. Their fears are misplaced. Our grand jury system has somehow survived over a century of motions to quash where a wide variety of claims have been asserted ranging from overbroad subpoenas to those that are oppressive or constitute harassment. And our courts have dealt with these claims with dispatch. In this case, most of the delay was consumed in the Fourth Circuit where practically all the respondent's claims were sustained. Significantly, the Government has never sought review of the Fourth Circuit's crucial holdings quashing the subpoenas for 2,000 video-tapes demanded in the first appeal

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[22] "In the field of the First Amendment, for years our courts have been called upon to rule on overzealous actions on the part of the police and prosecutors. *Lewellen v. Raff*, 843 F.2d 1103 (8th Cir. 1988), *cert. denied* 109 S.Ct. 1171 (1989); *Fitzgerald v. Peek*, 636 F.2d 943 (5th Cir.), *cert. denied* 452 U.S. 916 (1981); *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979); *Krahm v. Graham*, 461 F.2d 703 (9th Cir. 1972); *The Video Store, Inc. v. Holcomb*, 729 F.Supp. 579 (S.D. Ohio 1990); *ACLU v. City of Pittsburgh*, 586 F.Supp. 417 (W.D. Pa. 1984); *Penthouse International, Ltd. v. McAuliffe*, 436 F.Supp. 1241 (N.D. Ga. 1977), *aff'd*, 610 F.2d 1354 (5th Cir. 1980); *Drive-In Theaters, Inc. v. Huskey*, 305 F.Supp. 1232 (W.D.N.C. 1969), *aff'd*, 435 F.2d 228 (4th Cir. 1970).

and the 193 video-tapes in the second. Apparently these proceedings would have been delayed in any event due to the prosecutor's most unfortunate misunderstanding of the constitutional law as it bears on those issues.

And finally, a word should be said about the Fourth Circuit's decision being cast in terms of Rule 17(c). Obviously, the First Amendment phase of the case simply cannot be divorced from the Fourth Circuit's holding. Those issues were fully briefed and argued in the Fourth Circuit and were urged in opposition to the Government's petition for certiorari. Although the court of appeals did not specifically address the First Amendment, as it relates to the business records, respondents may urge any ground to support the court's judgment whether or not it was relied upon or considered below. *See, e.g., United States v. Arthur Young & Co.*, 465 U.S. 805, 814, n.12 (1984). And this Court, of course, can rely upon First Amendment principles to support its judgment of affirmance for it is empowered to look beyond the language used by the lower court and decide ". . . . precisely the ground on which the judgment rests." *Black v. Cutter Laboratories*, 351 U.S. 292, 298 (1956). Clearly, the foundation for the Fourth Circuit's decision is that the Government failed to show, in any way, the relevancy of the documents sought by the subpoena. (8a, 9a).

Thus, the Court should affirm the decision of the Fourth Circuit on grounds that the demand in this case involved records intimately connected with distribution of books and films protected by the First Amendment. The Court should adhere to the rule that requires a prosecutor who seeks all the business records of a distributor of magazines and videotapes, protected by the First

Amendment, to show that they are substantially related to a compelling state interest before their production can be demanded before a grand jury.

II

SINCE THE GOVERNMENT FAILED TO MAKE ANY SHOWING OF HOW THE SUBPOENAED RECORDS WERE RELEVANT TO THE GRAND JURY INVESTIGATION, THE SUBPOENAS WERE PROPERLY QUASHED UNDER BOTH THE FOURTH AMENDMENT AND RULE 17(c)

Even if this were not a First Amendment case, the Fourth Amendment would require the quashing of the subpoenas. The rule announced by the Fourth Circuit is consistent with a principle traditionally applied to resolve conflicts between a citizen's right of privacy and the Government's need to investigate crime. That rule, simply stated is: when a citizen complains that a prosecutor's grand jury subpoena unduly intrudes upon his private papers, protected by the Fourth Amendment and Rule 17(c), the Government must make some showing of how the information sought is relevant to the grand jury investigation. This well-respected rule reflects a sound national policy of protecting the integrity of the public's right to privacy and at the same time accommodating the Government's interests in prosecuting crime. This rule is deeply rooted in our constitutional tradition.

The right of privacy secured by the Fourth Amendment extends to Government process served upon a corporation which is the subject of a Government investigation. *Hale v. Henkel*, 201 U.S. 43, 76, 77 (1906). *See*

also Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924). Subpoenas for the production of business records are subject to Fourth Amendment scrutiny which includes judicial review to determine whether "the inquiry is one the demanding agency is authorized by law to make and the materials specified are *relevant*." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946) (Emphasis supplied).

A Governmental investigation into corporate matters may be so "*unrelated* to the matter properly under inquiry as to exceed the investigatory power." *United States v. Morton Salt Co.*, 338 U.S. 632 at 652, 70 S.Ct. 357 at 369 (1950) *citing Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298 (1924). And finally, the Court has emphasized that prosecutors will not be permitted to promiscuously embark upon "fishing expeditions." *FTC v. American Tobacco Co.*, 264 U.S. 298, 305-06 (1924). For instance, in the *American Tobacco* case this Court stressed, in language that was spare but telling:

> "It is contrary to the first principles of justice to allow a search through all [a corporation's] records, relevant or irrelevant, in the hope something will turn up." 298 U.S. at 306.

The *Morton Salt* case recognized the "relevancy" requirement imposed upon an investigating authority which requires that the "information sought [b]e reasonably relevant" to the inquiry. 338 U.S. at 642-43, 652. And in *Oklahoma Press*, the Court indicated, that the enforcement of an administrative subpoena is "essentially the same as the grand jury's, or the court's in issuing other pre-trial orders for the discovery of evidence, and *is governed by the same limitations*." 327 U.S. at 216.

(Emphasis supplied). In addition, other courts have correctly construed the crucial language in both *Morton Salt* and *Oklahoma Press* as fully applicable to grand jury subpoenas. *Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 90 (3rd Cir. 1973);[23] *In re Grand Jury Proceedings: Subpoena Duces Tecum Larry Danbom and Western Union v. United States*, 827 F.2d 301, 303 (8th Cir. 1987); *United States v. Boggs*, 493 F.Supp. 1050, 1052 (D.Mont. 1980).

". . . . in the hope something will turn up."

What was condemned in the *American Tobacco Co.* case is precisely what occurred here. MFR and R. Enterprises demonstrated that their records had absolutely no connection to Virginia. Once that showing was made, the Fourth Circuit rightly concluded that the prosecutor bore some burden of establishing a connection between their records and the Virginia investigation. Otherwise, the grand jury would be permitted to search through all of MFR and R. Enterprises' documents in the mere "hope that something will turn up."

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[23] As the Third Circuit perceptively pointed out in the *Schofield I* case, "Although grand jury subpoenas are occasionally discussed as if they were the instrumentalities of the grand jury, they are in fact almost universally instrumentalities of the United States Attorney's office or some other investigative or prosecutorial department of the Executive branch. Grand jury subpoenas then, when they are brought before the federal courts for enforcement, for all practical purposes are exactly analogous to subpoenas issued by a federal administrative agency on the authority of a statute, without any prior judicial control." 486 F.2d at 90.

This would have constituted the kind of outrageous "fishing expedition" so soundly condemned in the *American Tobacco* case. (8a-10a) When the Government failed to meet that burden, the subpoenas were correctly quashed because the prosecutor flatly refused to offer any explanation concerning how the records of a small bookstore in Brooklyn in any way related to a grand jury investigation in Virginia. Without any reasonable requirements of relevancy, every subpoena risks becoming a "fishing expedition." The element of relevancy is the sovereign ingredient that limits a subpoena to its legitimate purpose.

In *United States v. Powell*, 379 U.S. 48 (1964), this Court held that for an IRS summons to qualify for judicial enforcement it must be shown:

> That the investigation will be conducted pursuant to a *legitimate purpose*, that the inquiry may be *relevant* to the purpose, that the information is not already in the commissioner's possession and that the administrative steps required by the [Internal Revenue] Code have been followed. . . . 379 U.S. at 57, 58 (emphasis supplied)

The reasoning and logic of *Powell* is fully applicable to a grand jury subpoena. And the Fourth Circuit in *United States v. Richards*, 631 F.2d 341, 345 (4th Cir. 1980) equated an IRS summons to that of a grand jury subpoena. In *Richards* the court defined relevancy to mean, "a realistic expectation" that something may be discovered under the compulsory process employed by the Government. 631 F.2d at 345. It further concluded that an IRS summons will not be enforced if it amounts to no more than a "fishing expedition." 631 F.2d at 344, 345, *citing United States v. Powell*, 379 U.S. 48 at 57 (1964).

The Alignment of the Circuits on the Need For A Prosecutor to Show Relevance

Although employing different standards, most circuit courts in the country have adopted the rule requiring some showing of relevance when a subpoena is challenged. *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85 (3rd Cir. 1973); *In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963 (3rd Cir. 1975); *In re Grand Jury Matter (Gronowicz)*, 764 F.2d 983, 986 (3d Cir. 1985) (*in banc*) *cert. denied*, 474 U.S. 1055 (1986). *In re Grand Jury Subpoena Duces Tecum Issued on June 9, 1982)*, 697 F.2d 277, 281 (10th Cir. 1983).[24]

The Second Circuit requires the Government to make a showing of relevance once an aggrieved party establishes "that the information sought bears no conceivable relevance to any legitimate object of investigation by the federal grand jury." *In re Liberatore*, 574 F.2d 78 (2d Cir.

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[24] We pause here for a moment to point out that although the *Schofield* rule, requiring a preliminary showing of relevance, is sound and certainly comes well within the reach of the circuit court's authority, the Fourth Circuit has not insisted upon such a preliminary showing. The court of appeal's rule is simply that when a grand jury subpoena is challenged, then and only then, must the prosecutor make some showing that the materials sought are relevant to their investigation. The Government – we presume inadvertently – uses the term "preliminary showing" interchangeably with the traditional showing required by most courts when a subpoena is contested on relevance grounds.

1978).[25] The Sixth Circuit follows the rule employed by the Second Circuit and requires a showing of relevance when the "no conceivable relevance" test is fulfilled. *In re Grand Jury Subpoena, 84-1-24 #1 To Robert Battle, III*, 748 F.2d 327 (6th Cir. 1984). The Eighth Circuit holds that a district court has the power under Rule 17(c) to limit material demanded by a subpoena to that which is "relevant" to the grand jury investigation. *In re Grand Jury Proceedings: Subpoena Duces Tecum Larry Danbom and Western Union v. United States*, 827 F.2d 301, 305 (8th Cir. 1987). The other circuits have either not addressed the specific issue or have rejected the much maligned *Schofield* rule that requires a "preliminary" showing of relevance. *In re Grand Jury Proceedings Tom Hergenroeder*, 555 F.2d 686 (9th Cir. 1977); *In re Grand Jury Proceedings v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982).

Of course, "relevance," in the context of a grand jury investigation, is not probative relevancy, but rather it is measured by a less exacting standard. The relevancy requirement is satisfied as long as there is a logical connection between the subpoenaed documents and the charges that constitute the focus of the grand jury's

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[25] However, the Second Circuit cautioned:

> "This is not to say, of course, that the grand jury is endowed with an absolute license to seek evidence not *relevant* to its investigative function but we are only saying that the Government does not in each and every case bear the constant burden of initially showing the relevance of the particular evidence sought to be produced by way of subpoena." 574 F.2d at 83. (Emphasis supplied)

investigation.[26] *In re Special Grand Jury Impanelled January 21, 1975*, 529 F.2d 543, 549 (3d Cir. 1976); *United States v. Reno*, 522 F.2d 572, 576 (10th Cir. 1975); *In re Grand Jury Subpoena (Soto-Davila)*, 96 F.R.D. 406 (D.P.R. 1982).

In the face of these formidable authorities, ranging from this Court down through most of the circuit courts, it cannot be doubted that when a challenge is made to a subpoena, the prosecutor must make some "reasonable" showing of relevance. The flexibility of "reasonable relevance" gives a district court judge sufficient discretion to delineate those cases where the power of subpoena is being abused and require compliance when it is not. We assume that in most situations the Government will be able to show a reasonable degree of relevance – as they have done in virtually all the cases cited in both the Government's and the Respondent's briefs. Since the Government in this case elected to stand its ground and

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[26] Down through the years the *Schofield* rule has lost much of its luster. In decisions since the first *'Schofield'* case, the Third Circuit has made it clear that the *'Schofield* affidavit' requires only a minimum disclosure of the grand jury's purpose. Moreover, the Court regularly defers to the district court's judgments about the sufficiency of the particular *'Schofield* affidavit' in the circumstances of each case. Thus, a prosecutor in the Third Circuit is only required to make a showing that the documents sought are reasonably related to the "subject" of the grand jury's investigation. *See, In re Grand Jury Proceedings, Harrisburg Grand Jury*, 658 F.2d 211 (3d Cir. 1981); *Appeal of Hughes*, 633 F.2d 282, 286-88 (3d Cir. 1980); *In re Grand Jury Applicants, C. Schmitt & Sons, Inc.*, 619 F.2d 1022, 1028 (3d Cir. 1980); *In re Grand Jury Proceedings, Smith*, 579 F.2d 836, 838-39 (3d Cir. 1978): *In re Grand Jury Proceeding, Schofield II*, 507 F.2d 963, 975 (3d Cir. 1975). Even with the *Schofield* rule grand jury investigations in the Third Circuit have not come to a halt.

make absolutely no showing of relevance, the Fourth Circuit's decision should be sustained.

The requirement that a prosecutor justify a need for information sought in a criminal proceeding when constitutional or other legal objections are interposed is not novel. Over the years the Government has regularly been required to demonstrate some cause when its demands for evidence have conflicted with the constitutional rights asserted by individuals. For instance, in *Kastigar v. United States*, 406 U.S. 441, 460 (1972) when a defendant demonstrates that he has testified under a grant of immunity, the federal authorities have a heavy burden of proving that their evidence is derived from an independent, untainted source.

In *Gelbard v. United States*, 408 U.S. 41, 46-51 (1972) when a grand jury witness asserts a "colorable" claim that the questions to be asked before the grand jury are derived from electronic surveillance, the prosecutor must demonstrate that those questions are *not* obtained from unlawful eavesdropping. And only last year in *United States v. Zolin*, 491 U.S. , 109 S.Ct. 2619 (1989), this Court held that before a witness in a tax fraud investigation can be subjected to an *in camera* investigation of his attorney-client privilege claim, the Government must present sufficient evidence to support a reasonable belief that the inquiry will disclose a basis for the crime-fraud exception.

These are just a few examples of how courts have always been called upon to resolve the complaints of

citizens that prosecutors have overstepped their bounds. And in each and every case, our courts have traditionally required that a prosecutor establish, by some measure of proof, a basis for overriding the constitutional or legal rights asserted. To suggest that a prosecutor be able to decide for himself unilaterally his right to receive the information he seeks, paramount to the rights of the people, is unthinkable and is alien to our most basic constitutional disciplines.

The rules fashioned in these other cases are fully applicable to our grand jury situation. The right of privacy guaranteed by the Fourth Amendment is every bit as substantial as the attorney-client privilege; the privilege against self-incrimination or the right to know whether questions asked before a grand jury were derived from electronic surveillance.

The rule we urge strikes a reasonable balance between the Government's right to investigate suspected crimes and the rights of citizens to remain reasonably free from any unauthorized prying into the privacy of their affairs. Without these protections, then everyone would be at the mercy of prosecutors throughout the country who may, without restraint, abuse the grand jury process. Which would be better – to have no controls over a prosecutor's use of the subpoena power, or to adhere to the rule that requires some showing of relevance in a proper situation? This case, and the frightening *PHE* case cited earlier, illustrate why some constitutional controls must continue to be exerted in this area of the law.

Once again we must come back to the question of prejudice. How is a prosecutor disadvantaged by a modest showing of relevance in a Fourth Amendment case and a more substantial showing when the First Amendment is implicated? For over half a century prosecutors and lawyers for administrative agencies have been able to successfully advance their investigations working within the frame work of this rule. Then why can't the United States Attorney from the Eastern District of Virginia?[27]

The Solicitor General Agrees That In A Proper Case The Government Would Have to Show Relevance.

Today, in this Court, the Solicitor General, agrees that once a person shows that business records subpoenaed have "no conceivable relevance" to the grand jury's investigation, the prosecution is obligated to make some showing of relevance. *See In re Liberatore*, 574 F.2d 78 (2d Cir. 1978). But then, he quickly adds that the "no conceivable relevancy" test be limited to those instances of "genuine grand jury abuse."[28] However, such a harsh standard would, for all practical purposes, eliminate completely the relevance requirement and is constitutionally unacceptable.

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[27] But then this is the prosecutor who felt he was well within his rights in subpoenaing over 2,000 video-tapes to a grand jury in Virginia without any showing of relevance or that they were obscene. Perhaps that is the answer.

[28] Over the years the nomenclature of "abuse of grand jury process"; "reasonablenss"; "oppressiveness"; and "relevance"

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A much more workable rule, in a case involving a straight Fourth Amendment claim or an objection under Rule 17(c), would be for an aggrieved party to make a "reasonable" showing that the records sought are not relevant to the grand jury investigation. The standard of reasonableness has worked eminently well in virtually every other sector of the law. And under that criterion a district judge has sufficient discretion to weed out frivolous claims and attend to the meritorious ones. And it bears repeating, the implementation of the relevancy rule will not result in a host of "mini-trials" that will bring to a standstill grand jury investigations across the country. It hasn't in the past and it won't in the future. Most of these claims will be decided on papers. In those cases where meritorious claims are raised, in all likelihood, the district court will be satisfied with the Government's showing of relevance and in the exceptional case the prosecutor will narrow the subpoena. The reasonable relevance rule will not impair grand jury investigations.

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have, on occasion, been used interchangeably. Obviously, a subpoena that demands 500,000 documents from a company may constitute an abuse of the grand jury process; it can also be oppressive and unreasonable; and the documents are irrelevant to the grand jury's investigation. The complaint registered by the respondents raised all of these claims – "irrelevance," "abuse of grand jury process" and the "chilling" of First Amendment rights.

"And then who will guard the guards?"

Unhappily, during the last decade we have seen a rash of cases involving an abuse of the grand jury process both in federal and state courts.[29] Articles are coming forth in salvos discussing, in elaborate detail, abuses of the grand jury process – because recently an abundance of fresh information has been produced on this sad subject. Stored in the margin of this brief are some of the articles that are illustrative of a growing national concern.[30] Their assembly has dispelled the myth that a

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[29] *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983), (inflammatory hearsay which depicted the defendants as "bad persons"); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972), (prosecutor presented misleading hearsay evidence to grand jury); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979), (prosecutor's abuse of witnesses and prejudicial comments before a grand jury); *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (prosecutor committed a series of "indiscretions" before a grand jury); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974), (prosecutor presented perjured testimony before a grand jury).

[30] The articles that have expressed concern over grand jury abuse are: Althoff and Greig, *Concerns Raised by Recent Grand Jury Investigations*, 20 Crim. L. Bull. 217-32; Shannon, *The Grand Jury: True Tribunal of the People or Administrative Agency of the Prosecutor?* 2 N.M. L. Rev. 141 (1972); *Hearings on S. 3274 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong. 2d Sess. 39-40 (1976); Mueller, *Grand Jury Abuse: The Remedy after Mechanik and Kilpatrick*, 17 Colorado Lawyer 647(3) (1988); Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, 56 Fordham Law Review 129-150 (1987); Davis, Witley, *The Federal Grand Jury: Friend or Foe?*, 65

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grand jury is an independent body. In fact, it has become a "tool" of the prosecution and is used at their pleasure. None other than the late Mr. Justice Douglas, in a dissent, quoting Judge Campbell, who served over 32 years as a federal judge, stressed:

> "This great institution of the past has long since ceased to be a guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor – too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury." *United States v. Dionisio*, 410 U.S. 1, 23 (1973)

This court has displayed its sensitivity to these concerns when it said, at a minimum "the grand jury is not meant to be the private tool of the prosecutor." *United States v. Fischer*, 455 F.2d 1101, 1105 (2d Cir. 1972). Neither may a "United States attorney . . . issue a grand jury subpoena for the purpose of conducting his own inquisition," nor may "the Government conduct a general

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Mich B.J. 58-63 (1986); *The Grand Jury Subpoena: Is It the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their clients?*, 13 *Pepperdine L. Rev.* 791-821 (1986); Note, *The Exercise of Supervisory Power to Dismiss a Grand Jury Indictment – A Basis For Curbing Prosecutorial Misconduct*. 45 Ohio St. L.J. 1077-1101 (1984). The cases catalogued here reflect an alarming rise in the abuse of the grand jury process in one form or another. And in most of the cases courts were forced to reverse convictions or dismiss indictments because of the magnitude of the prosecutorial misconduct in connection with the grand jury.

fishing expedition under grand jury sponsorship." *In re September 1971 Grand Jury (Mara)*, 454 F.2d 580 (7th Cir. 1971), *rev'd, sub nom United States v. Mara*, 410 U.S. 19 (1973).[31] And yet this case perhaps better than any other demonstrates how the subpoena powers of the grand jury can be misused. The more common and widespread the misuse of grand jury subpoenas, the greater the need to deter prosecutorial overzealousness of this kind. The use of judicial intervention, and the adherence to a rule requiring some showing of relevance when a subpoena is challenged, enhances the protection of individual rights, deters future prosecutorial misconduct and preserves the integrity of the grand jury process. Federal courts, of course, have an institutional interest, independent of their concern for the rights of particular litigants, in preserving the appearance of fair practice of prosecutors before grand juries.

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[31] In fact a grand jury does operates as a law enforcement agency, with very little control. Grand jury subpoenas are issued by the United States Attorney's office. *See United States v. Martino*, 825 F. 2d 754 (3rd Cir. 1987); *Doe v. DiGenova*, 779 F. 2d 74, 80 (D.C. Cir. 1985). *United States v. Cleary*, 265 F. 2d 459, 461 (2d Cir. 1959) Under Rule 17(c) subpoena forms are issued in blank by the clerk of the court for a prosecutor to do with as he pleases.

Rule 17(c) Authorized The Quashing Of A Subpoena Which Demands Documents That Are Irrelevant To Grand Jury's Investigation.

Rule 17(c) authorized the Fourth Circuit's quashing of the subpoena in this case on grounds beyond those provided by the Fourth Amendment when enforcement of the subpoena would be unreasonable or oppressive. *See In re Grand Jury Subpoena Served February 27, 1984*, 599 F.Supp. 1006, 1018 (E.D. Wash. 1984); *Application of Radio Corp. of America*, 13 F.R.D. 167, 171 (S.D.N.Y. 1952); 8 J. Moore, *Moore's Federal Practice*, § 17.11 at 17-35 (1987). Thus courts are authorized in limiting subpoenas to matters having a greater degree of general relevancy to the subject matter of the investigation. In other words, the unreasonableness provision of Rule 17(c) provides a basis for quashing a subpoena that demands many, many documents that are irrelevant to the investigation – on the grounds that the subpoena is unreasonable.

Asserting that "even if respondents transacted no business in Virginia, that would not render the subpoenaed records irrelevant to the grand jury investigation," the Government hypothesizes:

> At a minimum, the records might demonstrate a pattern of obscenity violations, including violations in other States, and thus constitute evidence of knowledge and intent on the part of Martin Rothstein (respondents' owner). . . . Alternately, the out-of-state acts might constitute overt acts in a conspiracy, properly chargeable in Virginia, involving Rothstein or Model Magazine. Or, the out-of-state acts might prove that respondents or their principles aided and abetted obscenity violations committed in Virginia by either Rothstein or Model Magazine.

(Gov. Brf. 31-32; footnotes omitted.) These theories of relevance were not presented to the district court at the time respondents challenged the subpoena on relevancy grounds, nor is it known whether any of these theories was the actual basis for issuance of the subpoena. They are after-the-fact conjecture, offered for the first time in this Court. Even if one of these theories were the actual basis for issuance of the subpoena, respondents never had an opportunity in the district court to challenge its validity and the district court never determined its worth.

These theories, therefore, cannot sustain the subpoena at this stage of the proceedings. In *United States v. Rios*, 110 S.Ct. 1845 (1990), the Government contended in this Court that its delay in sealing electronic surveillance tapes was the result of a misunderstanding of the applicable statutory terms by the attorney supervising the surveillance, who believed he was not required to seek sealing of the tapes until a hiatus in the investigation. Even though the Court viewed this explanation as acceptable in the abstract, the Court pointed out that a satisfactory explanation cannot merely be one presented at the appellate level, but should be based on evidence presented and submissions made in the district court. *Id.* at 1851.

Noting that it was not clear if the supervising attorney's misunderstanding was the explanation advanced by the Government in the district court, the Court therefore remanded the case for a determination whether the explanation to the district court corresponded to that pressed in this Court. *Id.* Justice O'Connor, joined by Justice Blackmun, concurred, stressing that the Government's explanation "should be based on the findings

made and the evidence presented in the district court, rather than on a *post hoc* explanation given for the first time on appeal." *Id.* at 1852. Here, *none* of the Solicitor General's theories of relevancy were ever presented to the district court, not even *ex parte*. The court of appeals was therefore correct in quashing the subpoena. Speculative theories of relevancy offered for the first time in this Court cannot revive that subpoena.[32]

And finally the Government tries to impeach the Fourth Circuit's decision by arguing that it holds a grand jury subpoena can only be enforced if a prosecutor makes a showing that the documents sought would be admissible at trial. We believe this is a mischaracterization of the Circuit Court's opinion. For example, the district court's refusal to quash the subpoena requesting certain of Model's corporate records was sustained by the Fourth Circuit without any showing of their admissibility at a trial. In fact, a large portion of the records sought in all likelihood would not be admissible at a trial in Virginia. Clearly, the terms "relevance" and "admissibility" are collapsed in the Court's holding so that conceptually they mean the same. Respondents in the courts below argued strenuously the strict venue provisions for the prosecution of films claimed to be obscene. In that respect, the Court, as an added thought, observed that the documents from a bookstore in Brooklyn would "most likely" be

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[32] While the judgment of the court of appeals should therefore be affirmed, the Government remains free to issue a new subpoena for whatever materials it sees fit. Upon a motion to quash that subpoena in the district court on relevancy grounds, the Government would have an opportunity to assert in that court the relevance of the materials sought.

inadmissible at a trial. (10a). However, perhaps more importantly, this case cannot be judged in a vacuum or detached from its terrible history. It came to the Fourth Circuit bearing a stigma of prosecutorial overreaching that is still with it.

What this case comes down to is this: certainly a majority of the courts of this country have concluded that a prosecutor must make some showing of relevance when a good-faith challenge is made to a grand jury subpoena. The Fourth Circuit's holding is consistent with that principle and therefore it should be sustained. Because in a system where the rights of the individual must be constantly balanced against those of the Government, a citizen must always have the opportunity of challenging the power of the Government when it is claimed to be abusive. If we are to keep faith with these ancient principles, we simply cannot tolerate any rule that will allow a prosecutor unfettered discretion in demanding all of a company's private papers before a grand jury in a far-off state. For if we were to do so then we may well be on our way to letting prosecutors decide for themselves – out of official curiosity – what records they will require to be produced before a grand jury. And we will have to ask ourselves the question put by Juvenal over 1500 years ago, "And then who will guard the guards?"

CONCLUSION

The Writ of Certiorari should be dismissed as improvidently granted. In the alternative, the judgment of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RULE INVOLVED

Rule 17 of the Federal Rules of Criminal Procedure provides, in pertinent part, as follows:

> (c) Production of documentary evidence and of objects.
>
> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered

in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.